No. 2784

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TSUIE SHEE et al.,
Appellants,

vs.

SAMUEL W. BACKUS,
as Commissioner, etc.,
Appellee.

BRIEF FOR APPELLANT.

JOSEPH P. FALLON,
Attorney for Appellant.

Filed this.....day of April, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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Statement.

This is an appeal from an order denying a petition for a writ of habeas corpus in the District Court.

The appellant is a Chinese woman who made application to be admitted to the United States, on the 6th day of May, 1914, at the port of San Francisco, as the wife of a native born Chinese citizen of the United States: and was denied the right to enter the United States by the immigration officials on the ground that the relationship of wife to the said citizen had not been properly established to the satisfaction of said officials.

From the excluding decision the appellant's husband sued out a writ of habeas corpus in the United States District Court in and for the Northern District of California, and the said Court issued the writ of habeas corpus on the ground that the proper official action had not been taken by the Department of Labor; the Court making the writ temporary pending a review of the record in the case by the proper official of the Department of Labor. Upon showing made subsequently thereto that further action had been taken by the Department of Labor and which action satisfied the lower Court that the proper official had reviewed the record the Court ordered the writ discharged.

The appellant and child were released under bond pending the determination of the matter in the Courts; and subsequently thereto another child was born of the alleged union, and the couple now have two children; all of the family are now at large under bond pending the determination of this appeal.

Specification of Errors.

1. That the hearing accorded the detained was unfair in this that there was not an honest effort made to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law.

2. That the action of the immigration officials in searching the baggage of appellant's husband, without his consent, was a violation of Article IV in

Amendment of the Constitution of the United States.

3. That the withholding of certain letters and documents, containing new evidence and which were used on appeal, from the inspection of appellant and her attorney is a violation of Rule No. 5 (B) of the Rules governing the admission of Chinese.

4. That when the case was up for final hearing before the Secretary of Labor the appellant's counsel was not notified of said hearing and was given no opportunity to refute the charges contained in the new evidence submitted on the appeal.

Argument.

It would perhaps be proper to quote from the decisions of the Courts and endeavor to ascertain just what the law is in respect to these matters.

> "A full and fair hearing on the charges which threaten his deportation and an absence of all abuse of discretion and arbitrary action by the Inspector, or other executive officers, are indispensable to the lawful deportation of an alien.
>
> Where, by abuse of the discretion or the arbitrary action of the Inspector, or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the Courts of the United States to issue a writ of habeas corpus.
>
> The Japanese Immigrant case 189, U. S. 86, 1001, 101, 23 Sup. Ct. 611, 47 L. Ed. 721; Chin

Yow v. United States, 208 U. S. 8, 10, 12, 13, 28 Sup. Ct. 201, 52 L. Ed. 1165; Ex parte Pet Kos (D. C.) 212 Fed. 275; United States v. Chin Lew, 187 Fed. 544, 109 C. C. A. 10; United States v. Williams (D. C.) 185 Fed. 598, 604; U. S. v. Williams (D. C.) 193 Fed. 228, 231.

An alien as well as a citizen, is protected by the prohibition of deprivation of life, liberty, or property without due process and equal protection of the law. This principle is universal. It applies 'to all persons within the territorial jurisdiction of the United States without regard to any differences of race, of color, or of nationality.' "

Yick Wo v. Hopkins, 118 U. S. 356, 369, 6 Sup. Ct. 1064; 31 L. Ed. 220;

U. S. Rev. St., Section 1977 (2 Comp. Stat. 1913, Section 3925).

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."

In re Rosser, 101 Fed. 562, 567; C. C. A., 497;

United States v. Sibray (cc), 178 Fed. 144, 149.

That is not a fair hearing in which certain papers are seized and certain anonymous communications are received and never submitted for denial or refutation by the detained.

"While Congress has power to commit to executive officers the enforcement of the laws

> and regulations relating to the admission and exclusion of aliens, and declare that the conclusions of such officers in determining the right of an alien to enter shall be conclusive, a deportation order may be invalid, and the alien entitled to his discharge on habeas corpus, if it is unsupported by any evidence, or is the result of errors of law."
>
> U. S. v. Williams, 200 Fed. 538.

For the purpose of determining the question of whether the appellant was accorded a fair hearing we will consider the circumstances surrounding and under which the hearing was held.

At the time the hearing before the immigration service was held, in addition to the testimony of certain witnesses there were certain papers transmitted on appeal to the Washington office of the Department of Labor which contained new evidence, and which were never submitted to appellant or her attorney.

Rule 5, subdivision "B" of the rules governing the admission of Chinese provides as follows:

> "Applicant's counsel shall be permitted, after notice of appeal has been duly filed, to examine the record upon which the excluding decision is based, and may be loaned a copy of the transcript of testimony contained therein * * * The word 'record' as used in this paragraph shall not be construed to include memoranda of comment of letters of transmittal unless they contain evidence additional to that in the record proper."

The exhibits mentioned in the letters of transmittal claimed by the appellee to be privileged com-

munications, were withheld from appellant and her attorney and no inspection, comment or refutation was permitted. The letters of transmittal did contain matters of evidence against appellant and it is particularly set forth in the petition for a writ of habeas corpus in the record herein.

A re-examination was requested by appellant and no doubt if said examination had been granted would have resulted in the submission of additional evidence on behalf of appellant and her child which would have resulted in the appeal having been sustained by the Secretary of Labor; the refusal to permit the appellant to be re-examined was an abuse of discretion, and it was an unwarranted, arbitrary action of the immigration officials to refuse to conduct the re-examination as requested.

These papers were never a part of the certified record of the Department of Labor in the case of appellant and the transmitting of the said letters referred to in the petition contained in Exhibit "B" contemporaneously with the record of appellant and her child, and referring in the letter of transmittal to other cases, and asking that they be considered together, was an incorporation of said matters of evidence in the record against the said appellant and her child without giving them an opportunity to inspect the same, or make answer thereto, and such action was therefore arbitrary, and resulted in prejudice, unfairness and deprived the appellant of a fair hearing.

Appellant was represented by an attorney at Washington, D. C., when the record was placed before the Secretary of Labor for his final consideration, but said attorney was not granted an opportunity to appear and present the case as is more fully set forth in the Traverse to Return and Traverse to Supplemental Return, which is a part of the record and particularly referred to.

That cannot be considered a full and fair hearing that permits evidence to be introduced and considered by officials in a distant city without granting the applicant the opportunity to inspect the same; and which prevents the applicant from making any defense thereto.

It is patent that the purpose of the aforesaid Rule "B" was to obviate such a situation, and it indicates that an honest effort was not made to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law.

Another indication of the unfairness manifested by the immigration officials was the siezure of the appellant's husband's books, documents and papers without his consent and against his protest as is more fully set out in the Traverse to the Return and Traverse to Supplemental Return.

Because the hearing accorded the appellant was unfair in this that there was not an honest effort made to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law we respectfully request that the order of the

District Court denying the issuance of a writ of heabeas corpus be reversed and that the writ of habeas corpus issue as prayed for.

Dated, San Francisco,
April 12, 1917.

JOSEPH P. FALLON,
Attorney for Appellant.